In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1447

ODELL ANDREWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 434 F. 2d 978.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1970. A petition for rehearing was denied on January 6, 1971. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including March 6, 1971. The petition was filed on March 8, 1971, and is out of time under Rule 22(2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a violation of the co-conspirator rule in the admission of evidence or in the trial court's instructions.

2. Whether it was error to ask petitioner if he had been convicted of a felony then pending on appeal.

3. Whether the district court properly rejected the claim that an alleged unauthorized wiretap of a co-defendant tainted petitioner's conviction.

4. Whether a proper charge was given concerning the provisions of 21 U.S.C. 174, permitting the jury to infer illegal importation of heroin into the United States from its possession.

STATEMENT

Petitioner and Geraldine Griffin were indicted in the United States District Court for the Central District of California of federal narcotics violations. Counts 1 through 10 charged Miss Griffin with sales of narcotics on four occasions. Petitioner was charged only in count 10 jointly with Miss Griffin of receiving, concealing, selling and facilitating the sale of narcotics on April 3, 1969, in violation of 21 U.S.C. 174. Petitioner's motion to sever was granted. Following a jury trial he was convicted and sentenced to imprisonment for a term of ten years. The court of appeals affirmed (Pet. App. A).

The evidence is summarized in the opinion of the court of appeals. In substance, it shows that on the morning of April 2, 1969, narcotics agent Henry telephoned Miss Griffin, with whom he had had narcotics transactions the previous month, and asked if he could

purchase three ounces of heroin. She said that she would have to contact "her man"[1] and that Henry should call her back the next morning for the time and place (Tr. 783, 785, 827-828).

On April 3, Henry spoke with Miss Griffin several times regarding the purchase of three ounces of heroin at a price of $625 per ounce (Tr. 785, 828). She told him to meet her in the parking lot of the Midtown Shopping Center in Los Angeles at 11:30 a.m. (Tr. 579, 828). When Agent Henry drove to the designated place (Tr. 829-830), Miss Griffin told Henry to follow her to another parking lot at a supermarket (Tr. 579-580). At this location, the agent asked Miss Griffin if she saw her man. At first she said no but then turned toward the entrance of the supermarket and said "Oh, yes, I see him." She pointed at petitioner who was standing at the store's entrance holding a brown paper bag. Miss Griffin walked up to petitioner and was given the brown paper bag (Tr. 581, 607, 804-805, 831). She then returned to the agent, reached into the bag and handed the agent a clear plastic bag which contained heroin (Tr. 581, 588, 831). At this point, other agents watching the transactions converged on the scene and arrested Miss Griffin and petitioner (Tr. 582, 607-608, 805, 833).

Miss Griffin testified as a defense witness in an effort to exonerate petitioner from any participation in the narcotics transaction (Tr. 905, 909-914); she denied

---

[1] During the earlier transactions, Miss Griffin had referred to her source as "my man" (Tr. 141).

pointing out petitioner on April 3 as "her man" (Tr. 901).

ARGUMENT

1. Petitioner contends that there was insufficient independent evidence of his participation in a joint venture with Miss Griffin to justify admission against him of her statements to agent Henry that petitioner was "her man." If the jury believed—as government witnesses had testified—that petitioner handed Miss Griffin the brown paper bag from which she removed the heroin, that event in and of itself was sufficient independent evidence joining petitioner to the criminal enterprise. It is settled that events occurring after a statement is made can properly be considered in determining the existence of the scheme at the time of the statement. See *Lutwak* v. *United States,* 344 U.S. 604; *United States* v. *Ragland,* 375 F. 2d 471, 476-477 (C.A. 2).

Petitioner also argues that the trial court should not have left to the jury the question as to when the illicit association began (see Tr. 1029-1030), but should itself have determined as a matter of law whether the existence of the scheme had been sufficiently shown to justify admission of the out-of-court statements of Miss Griffin.[2] The procedure followed by the trial judge was consistent with the majority rule. It is true that in recent years the Second Circuit has held that the judge must make the initial determination that a connection

[2] In his instructions the trial judge first defined the traditional elements necessary for the jury to find a knowing partnership in

has been shown and then may instruct the jury that the participation of any defendant in a conspiracy can be established by the acts and declarations of other alleged conspirators. See, *e.g., United States* v. *Baker,* 419 F. 2d 83 (C.A. 2), certiorari denied, 397 U.S. 976; *United States* v. *Jacobs,* 431 F. 2d 754 (C.A. 2), petition for a writ of certiorari pending, No. 917, this Term. The Ninth Circuit has itself upheld, but not required, this approach. *Carbo* v. *United States,* 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953. Whatever the merits of the minority rule, there was nothing invalid in the approach followed here. It is clear both that there was in fact sufficient independent evidence to render the statements of Miss Griffin admissible and that the trial judge had so determined;[3] petitioner can hardly complain because he was given an additional opportunity to try to convince the jury to the contrary.

The decision in *Bruton* v. *United States,* 391 U.S. 123, does not purport to impair the established rule that statements by a co-defendant in furtherance are admissible against all members of the joint venture. Compare *Dutton* v. *Evans,* 400 U.S. 74. Moreover, in this case Miss Griffin testified at the trial and petitioner's coun-

---

crime (Tr. 1028-1030) and then charged that "the membership of a defendant, or any other person, in such a common plan or arrangement must be established by evidence as to his own conduct, what he or she knowingly said or did" (Tr. 1030).

[3] In its discussion with counsel regarding the instructions, the trial court stated that it had not allowed in the statement of Miss Griffin until it was satisfied "there was sufficient evidence in there to establish what might be considered to be a scheme" (Tr. 955).

sel had full opportunity to examine her about her out-of-court statements (see Pet. App. A 13).

2. Defense counsel objected to the questioning of petitioner when he took the stand as to a conviction for importing marihuana then on appeal.[4] When it was agreed that petitioner would be asked only whether he had been convicted of a felony, there was no objection (Tr. 871-873, 950); thus, petitioner has no grounds for complaint. Moreover, as petitioner himself notes (Pet. 22), the majority view is that questioning as to a prior conviction still on appeal is proper. *United States* v. *Empire Packing Co.*, 174 F. 2d 16, 20 (C.A. 7), certiorari denied, 337 U.S. 959, reaffirmed in *United States* v. *Hoffa*, 367 F. 2d 698, 713-715 (C.A. 7), remanded on other grounds, 387 U.S. 231, reaffirmed, 436 F. 2d 1243, certiorari denied, 400 U.S. 1000; *United States* v. *Owens*, 271 F. 2d 425, 426 (C.A. 2), certiorari denied, 365 U.S. 874; *United States* v. *Cipullo*, 170 F. 2d 311 (C.A. 2), certiorari denied, 336 U.S. 946; *Bloch* v. *United States*, 226 F. 2d 185, 188 (C.A. 9), certiorari denied, 350 U.S. 948. See also *Newman* v. *United States*, 331 F. 2d 968 (C.A. 8), certiorari denied, 379 U.S. 975. Only the District of Columbia has ruled to the contrary. *Fenwick* v. *United States*, 252 F. 2d 124. Nor is there any reason in the present context to reach petitioner's broader contention that impeachment

---

[4] Petitioner's conviction under 21 U.S.C. 176a was subsequently reversed and remanded under *Leary* v. *United States*, 395 U.S. 6, to determine whether petitioner knew of the illegal importation. On remand, a finding of knowledge was made and the conviction was reimposed; that conviction is now on appeal.

through use of prior convictions should be drastically curtailed.

3. Miss Griffin testified that one of the agents who drove her down to headquarters after the arrest told her that there had been a "tap" of her telephone. She was unable, however, to identify the agent or provide any other details (Tr. 924). Agent Henry testified that he notified the other agents via radio from his office of the substance of his telephone conversations with Miss Griffin on the day of the arrests (Tr. 833-834). While agent Carter, originally called to identify a handwriting exemplar of petitioner, testified that he had been advised to take up surveillance by a different method—*i.e.*, by car radio—(Tr. 812-813), this hardly supported the claim of the use of wiretap evidence against Miss Carter, much less against petitioner.

4. Petitioner's contention that it was error to instruct the jury that it could infer illegal importation of heroin into the United States by virtue of possession is answered by *Turner* v. *United States*, 396 U.S. 398. Testimony introduced at the trial of co-defendant Griffin as to the possibility that the heroin could be domestically synthesized (Tr. 296-298), was not presented at petitioner's trial. In any event, that possibility, known at the time of the *Turner* decision, does not impair the overwhelming evidence that heroin consumed in the United States is illegally imported. *Turner* v. *United States, supra*, at 415-416.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
PETER A. CHAPIN,
Attorneys.

May 1971.

☆ U.S. Government Printing Office: 1971—423-175/607